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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-972

WESTVACO CORPORATION, PACKAGING CORPORATION OF AMERICA, AND GEORGIA-PACIFIC CORPORATION,

Petitioners,

vs.

ADAMS EXTRACT COMPANY, ET AL.,

Respondents.

BRIEF OF RESPONDENTS-PLAINTIFFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Of Counsel:
GARY V. McGOWAN,
MANDELL & WRIGHT,

Of Counsel:
ANDREW M. SCHATZ,
FAY CLAYTON,
SACHNOFF SCHRAGER
JONES WEAVER &
RUBENSTEIN, LTD.

STEPHEN D. SUSMAN,
806 Main Street,
Houston, Texas 77002,

LOWELL E. SACHNOFF,
One IBM Plaza,
Chicago, Illinois 60611.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6555

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vs.

ADAMS EXTRACT COMPANY, ET AL.,

Respondents.

BRIEF OF RESPONDENTS-PLAINTIFFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Respondents-Plaintiffs, representatives of a class of persons purchasing corrugated containers from defendants, including Petitioners, respectfully pray that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

QUESTION PRESENTED.

Whether in a price-fixing conspiracy action brought as a class action under the antitrust laws, this Court should create a new rule of contribution permitting non-settling defendants, who may or may not be ultimately found guilty of price-fixing, to now assert a claim for contribution against defendants who settled in good faith with the class under circumstances that the

District Court, in approving the settlements according to Fed. R. Civ. P. 23(e), expressly found to be non-collusive, fair and reasonable.

REASONS FOR DENYING THE WRIT.

This Court should deny the Writ because there is no real conflict in decisions concerning contribution in price-fixing cases, because the decisions of the courts below denying contribution were correct, because creating a new judicial rule of contribution is inappropriate especially in light of current consideration of the matter by Congress and because contribution would be unfair and improper in this particular case, which involves charges of a massive nationwide price-fixing scheme in one of our country's basic industries.

A. There Is No Real Conflict Among the Lower Courts.

Contrary to Petitioners' argument, there is no real conflict among the lower courts. Courts have repeatedly rejected contribution in the context of price-fixing allegations. *See Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F. 2d 897 (5th Cir. 1979); *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1979-2 Trade Cases (CCH) ¶ 62,995 (10th Cir. 1979); *Hedges Enterprises* v. *Continental Group, Inc.*, 1979-1 Trade Cases (CCH) ¶ 62,717 (E. D. Pa. 1979); *In re Ampicillin Antitrust Litigation*, MDL 50, 917 ANTITRUST & TRADE REG. REP. (BNA) 1 (D. D. C. 1979); *El Camino Glass* v. *Sunglo Glass Co.*, 1977-1 Trade Cases (CCH) ¶ 61,533 (N. D. Cal. 1976); *Sabre Shipping Corp.*, v. *American President Lines, Ltd.*, 298 F. Supp. 1339 (S. D. N. Y. 1969). *Cf. Goldlawr, Inc.* v. *Schubert*, 276 F. 2d 614 (3d Cir. 1960).

The only case cited by Petitioners in support of contribution, *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F. 2d 1179 (8th Cir. 1979), a case involving a refusal to deal rather than price-fixing, is distinguishable from the

case now before this Court on several grounds.[1] Professional Beauty Supply ("Professional") sued a competitor, National Beauty Supply ("National") after Professional's distributorship had been cancelled by LaMaur, its supplier. National sought to assert a claim for contribution against LaMaur, which had not been sued by Professional. The Court of Appeals held that because the factual circumstances of that case *might* justify contribution, it had been improper to dismiss the third-party complaint for contribution. 594 F. 2d at 1186.

The decision in *Professional Beauty Supply* was specifically limited to certain facts which strongly suggested collusion, and thus unfairness, in the absence of some allocation of damages. Specifically, there was evidence that the supplier was not named as a defendant in exchange for an agreement to renew Professional Beauty Supply's franchise. 594 F. 2d at 1185. Thus the court held *not* that contribution was available in all antitrust actions, as Petitioners suggest, but that contribution should be available where necessary to protect against collusion and bad faith:

> The deciding factor in our decision is fairness between the parties. We conclude that fairness requires that the right of contribution exist among joint tortfeasors *at least under certain circumstances.* There is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one alone *because of the plaintiff's whim or spite, or his collusion with the other wrongdoer.*

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1. The simple fact that *Professional Beauty Supply* involved a refusal to deal rather than price-fixing may itself be a significant factor in evaluating any "conflict" among the lower courts. This Court has consistently held that a refusal to deal is unlawful only if unreasonable, whereas price-fixing is illegal per se because it attacks the very foundation of our economic system. *See, e.g., Continental T. V. Inc.* v. *GTE Sylvania, Inc.*, 433 U. S. 36, 49-50 (1977); *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 609-10 (1972). This distinction in standards of legality reflects the relative evils involved and may warrant greater consideration of contribution, based on fairness, where reasonableness is the standard, but greater deterrence and no contribution, where defendants have engaged in the more odious price fixing.

> . . . *We do not hold that contribution is available to all violators of the antitrust laws, regardless of the flagrancy of the conduct of the party seeking contribution.* The decision of whether a particular party is entitled to contribution is best left to the trier of fact upon consideration of all of the circumstances of a case, including the factors specified by Justice White in his concurring opinion in *Perma Life Mufflers, Inc.* v. *International Parts Corp., supra.* (Emphasis added).

594 F. 2d at 1185-1186. Furthermore, the Court in *Professional Beauty Supply,* noting that "[t]he problem of how to treat a joint tortfeasor who has settled in good faith is not present in this case", 594 F. 2d at 1184, indicated that the proper means of protecting defendants settling in good faith might be to permit a reduction in damages only by the amount previously recovered. *See* 594 F. 2d at 1184 citing *"Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 401 U. S. 321 (1971) (if plaintiff recovered damages in settlement from one defendant he could not recover for the same damages from another defendant)."[2] Thus, at least in the context of this case, where fairness argues strongly against permitting contribution, see pp. 10-13 *infra,* the opinion of the Court of Appeals for the Eighth Circuit is not in conflict with those of other courts and does not provide sufficient reason to grant the Writ.

B. The Decisions of the Courts Below Denying Contribution Were Correct and Consistent with Well Established Precepts of This Court.

The no-contribution rule upheld by the courts below necessarily follows from several lines of precedent established by this Court. First, this Court has continually held that a primary purpose of the antitrust laws is deterrence. *Pfizer, Inc.* v.

2. It is thus clear that the Court in *Professional Beauty Supply* did not necessarily endorse claim reduction, as Petitioners suggest. In any event, claim reduction is not before this Court at this time. See n. 7 *infra.*

Government of India, 434 U. S. 308 (1978); *Illinois Brick Co.* v. *Illinois,* 431 U. S. 720 (1977). Second, the aims and purposes of the treble damage remedy under the antitrust laws require that a defendant not be released by virtue of a settlement concluded with another defendant except to the extent of money actually received by the plaintiff from the settling defendant to prevent double recovery. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 401 U. S. 321, 346, 348, *reh. denied,* 401 U. S. 1015 (1971); *see Baugham* v. *Cooper-Jarrett, Inc.,* 530 F. 2d 529, 533-35 (3d Cir. 1976); *Flintkote Co.* v. *Lysfjord,* 246 F. 2d 368 (9th Cir. 1957). Finally, this Court has stressed that the paramount importance of the private civil damage action as the "bulwark of antitrust enforcement," *Perma Life Mufflers, Inc.* v. *International Parts Co.,* 392 U. S. 134, 139 (1968), requires that complexities which would discourage private treble damage actions be eliminated wherever possible. *See Illinois Brick Co.* v. *Illinois,* 431 U. S. 720, 747 (1977) (no standing for indirect purchasers); *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U. S. 481, 489 (1968) (no defense allowed for "pass-through" of costs); *Perma-Life Mufflers, Inc.* v. *International Parts Co.,* 392 U. S. 134, 140 (1968) (no defense allowed for "in pari delicto").

Each of these established rules clearly supports the decisions of the courts below and warrants denial of the Writ sought by Petitioners. Deterrence, which is stressed under the antitrust laws by the provision for treble damages, would be severely undermined if a potential conspirator were permitted to seek contribution and thus to consider the risk of liability for price-fixing as a mere business risk. Furthermore, permitting contribution would make antitrust litigation tremendously more complex and less amenable to control by the private plaintiffs on whose shoulders effective enforcement rests; in this case alone, contribution among the 38 defendants could aggregate over 1300 claims. Finally, because mutual resolution of the substantially increased number of claims is virtually impossible and because many defendants would be reluctant to settle with plain-

tiffs while remaining subject to potential liability to the non-settling defendants, the inevitable result of contribution would also be a reversal of the long established principle of this Court that settlement should be encouraged.[3] *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U. S. 321, 346-47, *reh. denied*, 401 U. S. 1015 (1971); *Williams* v. *First National Bank*, 216 U. S. 582, 595 (1910). Thus, the decisions below rejecting contribution are consistent with long established principles enunciated by this Court and necessary for effective continued functioning of private antitrust litigation.

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3. The petitioners admit that contribution would discourage settlement, but argue that such an effect can be avoided by the settling parties agreeing upon or the Court imposing "claim reduction." With claim reduction, plaintiffs' claim against the remaining defendants would be reduced not only by the amount the plaintiffs have received in settlement from the other defendants, but also by the amount of the overcharge attributable to the settling defendant's sales, or by the defendant's market share. The instant case presents two dramatic examples of the way in which settlement would be discouraged by a rule of contribution, even if it were coupled with some sort of claim reduction. The instant case is a class action and no class action may be settled unless the trial court finds that the amount of the settlement is fair and reasonable to the class. Free of contribution or claim reduction, partial settlements with less culpable and less solvent defendants are possible because only the amount paid in settlement is subtracted from the plaintiffs' damages, and the plaintiffs do not waive a greater portion of their damages claim. *Flintkote Co.* v. *Lysfjord*, 246 F. 2d 368, 397-98 (9th Cir. 1957); *Wainwright* v. *Kraftco*, 58 F. R. D. 9, 12 (N. D. Ga. 1973): If contribution or claim reduction were the rule, plaintiffs would not be able to settle inexpensively with less solvent defendants or defendants against whom proof is more sparse, because by so settling plaintiffs would be foregoing a much larger portion of their damage claim. The court would be unlikely to approve any such settlement as fair and reasonable to the class. Consequently, the least meritorious claims and claims against the least solvent defendants would be unable to settle. At least two of the settlements entered in this litigation were explicitly "hardship" settlements with defendants who, regardless of culpability or damages, could not afford to pay more. See Petitioners' Brief at 13. Plaintiffs would not have been willing to accept these settlements, which preserved the continued competitive viability of these financially troubled defendants, if the result would have been an automatic and substantial reduction in plaintiffs' claims based on sales or damages attributable to these defendants, nor could the court have approved them.

C. Creation of a New Rule Permitting Contribution Should Be Left to Congress, Especially in Light of Pending Consideration in Congress of the Issue of Contribution in Antitrust Cases.

This Petition is particularly untimely in view of the fact that legislation on contribution in price-fixing cases is currently pending in Congress. See S. 1468, 96th Cong. 1st Sess. (1979).[4] This Court has long acknowledged that Congress, rather than the courts, is responsible and best equipped for making appropriate evaluations in connection with policy decisions. In no area is this judicial restraint more desirable than in antitrust litigation, where treble damages and joint and several liability are crucial elements of the Congressional scheme of private enforcement. This Court recently recognized that such deference to Congress is particularly appropriate in connection with claims, such as those asserted by Petitioners here, that large damage awards in antitrust class actions will have a disastrous effect upon defendants, and that therefore the courts should fashion rules to undermine these important elements of the Congressional scheme:

> [R]espondents argue that the cost of defending consumer class actions will have a potentially ruinous effect on small businesses in particular and will ultimately be paid by consumers in any event. These are not unimportant considerations, but they are policy considerations more properly addressed to Congress than to this Court. However accurate respondents' arguments may prove to be—and they are not without substance—they cannot govern our reading of the plain language in § 4 [of the Clayton Act].

Reiter v. *Sonotone Corp.*, 47 U. S. L. W. 4672, 4676 (June 11, 1979). As in *Reiter*, the Petitioners in the instant case have

4. A copy of this bill as favorably reported by the Senate Committee on the Judiciary in November, 1979 is contained at A4 of Appendix A. This bill would only apply to litigation commenced after its passage, thus indicating a specific choice not to apply contribution to existing cases such as this.

argued unfairness primarily because of the size of the case and the potential liability involved[5] and have made arguments that have little to do with the antitrust statutes enacted by Congress. Yet surely this Court should be reluctant to use this case, where claims are indeed sizeable, as a vehicle for fashioning a rule of law that would apply to even the most garden variety antitrust case.

This Court has already held that contribution is one of those policy issues best left to Congress. In *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282 (1952), this Court strongly cautioned against taking from the Congressional domain the creation of rules relating to contribution:

> In the absence of legislation, courts exercising a common law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors [citing Union Stock Yards Co. v. Chicago B. & Q. R. Co., 196 U. S. 217, 224 (1904)] . . . We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action.

342 U. S. at 285 (1952).[6] Nowhere is this policy more appropriate than in interpreting the long standing antitrust statutes.

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5. Indeed, it is the magnitude of the damages for which the defendants would be liable and not contribution which, according to Petitioners, causes the problem. George Kress, chairman of settling defendant Green Bay and author of the prepared statement to the Senate Judiciary Committee which is Petitioners' Appendix G, conceded to the Senate Judiciary Committee that contribution would not solve his problem because the high damage exposure upon being found guilty of price-fixing would still be a powerful inducement to settle. See Hearings before the Subcommittee on Antitrust, Monopoly and Busines Rights of the Committee on the Judiciary, United States Senate on S. 1468, June 8 and 12, 1979 at p. 43.

6. This rule of judicial restraint is in no way undermined by the decision in *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U. S. 106 (1974), inappropriately cited by Petitioners. In *Cooper Stevedoring Co.*, this Court upheld "the well-established maritime rule allowing contribution", which was contrary to the general common

(Footnote continued on next page.)

Indeed, it appears that Congressional intent upon adoption of the Clayton Act in 1914 was not consistent with contribution. The Report of the Committee on the Judiciary of the United States Senate on S. 1468 notes that the proposed bill would "supply the appropriate congressional intent" which courts have perceived was lacking. Appendix A at A10. In explaining why the need for contribution is different today than in 1914, the Report notes:

> the problem in price-fixing cases is one of relatively recent origin. As the hearing record indicates, the vast class action damage exposure from which the problem results did not surface until the 1970s, after a revision of Rule 23 to permit the modern class action in 1966 and the denial of the pass-on defense in [*Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481 (1968)].

Rep. No. 96-428 (S. 1468) (Appendix A) at A11.

The persistent reliance by Petitioners upon cases involving claims under the federal securities laws is entirely misplaced and misleading. Whereas the antitrust statutes contain no reference to contribution, the securities laws specifically provide for contribution where Congress has established private rights of action. *See* 15 U. S. C. §§ 77k, 78i, 78r. Other comparisons also support the conclusion that lack of contribution in the antitrust statutes evidences a desire for greater deterrence than in the securities laws. *Compare* 15 U. S. C. § 15 (treble damages in antitrust actions) *with* 15 U. S. C. § 78bb(a) (damages for actual losses only in securities actions); *compare United States* v. *Container Corp.*, 393 U. S. 333 (1969) (intent to agree to fix prices required) with *First Virginia Bankshares* v. *Ben-*

(Footnote continued from preceding page.)

law, 417 U. S. at 113, while reaffirming *Halcyon Lines*. *Id.* at 112-113. Indeed, this Court's recent decision in *Edmonds* v. *Compagnie Generale Transatlantique*, 47 U. S. L. W. 4868 (June 27, 1979), reaffirmed not only *Halcyon Lines* and *Cooper Stevedoring Co.* but also the broader policy against judicial intervention in legislated areas, citing both earlier decisions. 47 U. S. L. W. at 4872.

son, 559 F. 2d 1307 (5th Cir. 1977), *cert. denied*, 435 U. S. 952 (1978) (reckless conduct sufficient for securities law violation) and 15 U. S. C. § 77*l* (misrepresentation without scienter actionable under securities laws). The conspicuous absence of any provisions relating to contribution in the antitrust statutes is indeed significant, for this Court has continually noted that:

> "Obviously, then, when Congress wished to provide a private damage remedy, it knew how *to do* so and did so expressly. *Touche Ross & Co.* v. *Redington*, 47 U. S. L. W. at 4735; *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. at 734; see *Amtrak*, 414 U. S., at 458; *T. I. M. E., Inc.* v. *United States, supra*, at 471.

Transamerica Mortgage Advisors, Inc. v. *Lewis*, 48 U. S. L. W. 4001, 4004 (November 13, 1979).

Although it is clearly within the province of Congress to amend the antitrust statutes to deal with the modern development of the large class action, such a development is not a sound basis for a new interpretation by this Court of the statutes that preceded that development. Where, as here, the creation of a new policy sought by Petitioners is being fully considered in Congress at this time, and the Congressional decision will determine the course which courts will follow, the Writ should be denied.

D. If Fairness Is Truly a Consideration in Contribution, as Petitioners Contend, This Case Is Peculiarly Inappropriate for Granting the Writ.

Petitioners have suggested that alleged "settlement coercion" and "inequitable allocation of liability" make contribution warranted in this case. As Respondents have noted above, Petitioners apparently would have this Court make decisions on the basis of the size of potential damages rather than the legal issues, a decision generally left to Congress. However, Petitioners' position is even more untenable, because under the

circumstances of this case, fairness would necessarily preclude contribution.[7]

First, Petitioners (who have *not* settled) argue the financial hardships faced by several small settling defendants who are asserted to be marginally profitable and otherwise in financial trouble (Petitioners' Brief at 12-13). Yet, it is these very same settling defendants who would be most injured by a rule permitting contribution. If contribution were permitted, these settling defendants, who, according to Petitioners, have been "coerced or driven to the edge of bankruptcy, would be forced to pay just that much more![8] Thus it is contribution which in this context could be used by larger non-settling defendants as a coercive anticompetitive device to drive their smaller competitors out of the marketplace.

Second, this case is a particularly inappropriate vehicle for considering the contribution issue because of the wide range

7. Even if unfairness did exist, Petitioners can raise these arguments more appropriately at or after trial. Petitioners impermissably attempt to raise before this Court the concept of "claim reduction" or "carve out" by which the settlements would be preserved and plaintiffs would automatically lose that portion of their claims against the non-settling defendants equal to the market shares of the settling defendants. The numerous theoretical and practical falacies inherent in such a concept need not be discussed at this time. However, it must be noted that the District Court's denial of the affirmative defense of "claim reduction" was determined by the Court of Appeals to be nonappealable, and the appeal by Petitioners as to this issue was dismissed (See Petitioners' Brief, Appendix B). The Court of Appeals has never ruled on the merits of this issue and no ruling on claim reduction has been presented to this Court. Furthermore, in the recent decision of the District Court approving the class action settlements with certain defendants, Judge Singleton reserved consideration of the motion for claim reduction until "the case is submitted to a jury." Appendix B hereto at B12. The issue of claim reduction thus will not be ripe for appeal until a later date and cannot be considered at this time.

8. The District Court in this case, in recently approving the settlements, noted that these defendants would be bound to the settlement agreements even if this Court reversed the decision of the Fifth Circuit Court of Appeals on the contribution issue, stating that the contingencies regarding contribution were factored into the settlement agreements by defendants' attorneys. Appendix B at B12.

of factors considered by the District Court in approving the settlements. Because the cases in MDL 310 were filed as class actions under Rule 23 of the Federal Rules of Civil Procedure, the District Court was required to and did scrutinize and pass upon each proposed settlement to ensure that each was negotiated in good faith, was not the product of plaintiffs' "whim or spite or of collision" with the settling defendants, and was satisfactory on the basis of all relevant factors, including among them the financial ability of the defendants. See Fed. R. Civ. P. 23(e). Thus, this case is the farthest extreme from the collusive situation present in *Professional Beauty Supply, supra,* and review of the issue of contribution in this case at this time would likely be fruitless in light of the determinations as to the good faith of plaintiffs and defendants in the settlements already approved by the District Court in its discretion. *See Protective Committee* v. *Andersen,* 390 U. S. 414 (1968).

Third, Petitioners' charges of "coercion" and "settlement stampedes" have a hollow ring. No innocent defendant was coerced into settling for the substantial sums paid below.[9] The District Court, clearly in the best position to do so, gave careful consideration to these charges before denying contribution and before granting final approval to the settlements. Any defendant which considers itself wrongly accused of price-fixing

9. In support of their allegation that innocent parties were pressured into settling, Petitioners have submitted a blatantly untrue statement made by George Kress of Green Bay Packaging, Inc., before the Senate Judiciary Committee (Petitioners' Appendix G). At page G-2. Kress states, "Green Bay was not indicted, and none of our employees were named as co-conspirators by the Justice Department attorneys conducting the criminal trial." In truth *eleven Green Bay employees were identified as co-conspirators by the Justice Department,* as the letter dated July 21, 1978, from J. Albert Kroemer, Antitrust Division of the Department of Justice, Dallas Office, clearly states. Appendix C. This letter, naming eleven Green Bay employees as co-conspirators, was filed in the criminal case as an informal bill of particulars, and Petitioners should not be heard falsely to claim that Green Bay employees were not named as co-conspirators. There is thus no substance to Petitioners' claim that any innocent party was forced to settle.

always has the option of establishing its innocence at trial. The possibility of any form of contribution would, after all, come into play only after a defendant has been found guilty of price-fixing.

Finally, this case is an inappropriate vehicle to review the issue of contribution because it is likely that any decision to adopt a rule of contribution would not apply to this particular case. The settling defendants have argued that their reliance upon long established precedent and the hardship that would be caused to them by now adopting a rule of contribution requires that any new rule permitting contribution be given prospective effect only under the doctrine enunciated in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971). The points made in Petitioners' own brief concerning the tremendous burden upon these settling defendants seems to support this contention. Under such circumstances, granting the Writ would be improvident and review should await the full termination of the litigation in the District Court.

CONCLUSION.

For each of the foregoing reasons, Respondents-Plaintiffs respectfully request that the Writ of Certiorari be denied.

Respectfully submitted,

STEPHEN D. SUSMAN,
806 Main Street,
Houston, Texas 77002,

LOWELL E. SACHNOFF,
One IBM Plaza,
Chicago, Illinois 60611

Of Counsel:
GARY V. McGOWAN,
MANDELL & WRIGHT,

Of Counsel:
ANDREW M. SCHATZ,
FAY CLAYTON,
SACHNOFF SCHRAGER
JONES WEAVER &
RUBENSTEIN, LTD.

Dated: January 21, 1980.

APPENDIX A.

EXCERPTS FROM SENATE REPORT Calendar No. 456

96TH CONGRESS
1st Session

SENATE

REPORT
No. 96-428

ANTITRUST EQUAL ENFORCEMENT ACT OF 1979

REPORT

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ON

S. 1468

together with

SUPPLEMENTAL VIEWS

NOVEMBER 27 (legislative day, NOVEMBER 15), 1979.—Ordered to be printed

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MARY K. JOLLY, *Staff Director and Counsel*
MARCIA ATCHESON, *General Counsel*
JESSICA J. JOSEPHSON, *Counsel*

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II. Text of Senate Bill 1468

The text of S. 1468 is as follows:

A BILL To provide for contribution of damages attributable to an agreement by two or more persons to fix, maintain, or stabilize prices under section 4, 4A, or 4C of the Clayton Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Clayton Act (15 U.S.C. 12 et seq.) is amended by inserting after section 4H the following new section:

"Sec. 4I. (a) Two or more persons who are subject to liability for damages attributable to an agreement to fix, maintain, or stabilize prices under section 4, 4A, or 4C of this Act may claim contribution among them according to the damages attributable to each such person's sales or purchases of goods or services. A claim for contribution by such person or persons against whom an action has been commenced may be asserted by cross-claim, counterclaim, third-party claim, or in a separate action, whether or not an action has been brought or a judgment has been rendered against the persons from whom contribution is sought.

"(b) A release or a covenant not to sue or not to enforce a judgment received in settlement by one of two or more persons subject to contribution under this section shall not discharge any other persons from liability unless its terms expressly so provide. The court shall reduce the claim of the person giving the release or covenant against other persons subject to liability by the greatest of: (1) any amount stipulated by the release or covenant, (2) the amount of consideration paid for it, or (3) treble the actual damages attributable to the settling person's sales or purchases of goods or services. Under item (3) above, actual damages shall not be trebled in proceedings under section 4A of this Act.

"(c) A release or covenant, or an agreement which provides for a release or covenant, entered into in good faith, relieves the recipient from liability to any other person for contribution, with respect to the claim of the person giving the release or covenant, or agreement, unless the settlement provided for in any such release, covenant, or agreement is not consummated.

"(d) Nothing in this section shall affect the joint and several liability of any person who enters into an agreement to fix, maintain, or stabilize prices.

"(e) This section shall apply only to actions under section 4, 4A, or 4C of this Act commenced after the date of enactment of this section.".

V. Background and Need for Legislation

1. History of contribution generally

The first recorded discussion of the law of contribution can be found in the case of *Merryweather* v. *Nixan*, 8 Term Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799), which established the English common law rule against contribution among joint tort-feasors. In a discussion of the rule, the judge in *Knell* v. *Feltman*, 85 U.S. App. D.C. 22, 26, 174 F. 2d 1662, 666 (1949) stated:

> Due to the brevity of the report and a misleading headnote, the Merryweather case has often been cited in support of the sweeping proposition that no contribution can be had between joint tort-feasors. It is plain, however, that the ruling of the case was limited to the denial of contribution between wilful or intentional wrongdoers.
>
> Nevertheless, after a period of adherence to the true *Merryweather* holding, the majority of American courts have long flatly said there can be no contribution between joint or concurrent tort-feasors, without distinguishing between those who are intentional wrongdoers and those whose unpurposed negligence results in a tort.
>
> Widespread revulsion against that rule, which Chief Justice Groner said "is not sustainable upon any fair basis of reasoning, is wrong, and should be overruled," was demonstrated when the legislatures of some fifteen States enacted alleviating statutes in one form or another. Dissatisfaction with the rule is further shown by the fact that many courts have "riddled it with exceptions." [Footnotes omitted.]

A footnote in an article on contribution in the Cornell Law Journal also attempts to deal with *Merryweather* and states that:

> This view [against contribution] however, has been slow to take hold on American jurisdictions, many of which apply the rule [of contribution] equally to intentional and unintentional tort-feasors . . . The basis of the rule, to the

> extent that a rational basis exists, lies in the maxim that "no man can make his own misconduct the ground for an action in his own favor . . . The law cannot recognize equities as springing from a wrong in favor of one concerned in committing it." 63 Cornell Law Review 1978 at 682.

However, the inequity and irrationality of this precedent were too great, and in 1935 England overruled *Merryweather* by statute.

In the United States, the law evolved away from a strict no contribution rule which has simply not satisfied modern requirements of fairness: "The common-law refusal to let . . . loss be spread among all the tort-feasors, because the claimant for contribution is a 'bad-man' and hence not entitled to the aid of the courts, is misplaced prudery," *Gregory, Contribution Among Joint Tort-feasors: A Defense*, 54 Harv. L. Rev. 1170, 1170 (1941). Indeed, the old rule has been rejected in a large majority of American jurisdictions, see generally, *Zapico* v. *Bucyrus-Erie Co.*, 579 F. 2d 714, 718 (2d Cir. 1978).

As described more fully below, the trend toward contribution has resulted from the realization that "a more equal distribution of justice can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame." *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106, 111 (1974). Courts adopting contribution have characterized it as a "rule of reasoned fairness," and indicated that "there is no longer a legitimate place in our system, if indeed, there ever was, for a rule of law which places the full burden of restitution upon one who is only in part responsible for a plaintiff's loss." *Gomes* v. *Brodhurst*, 394 F. 2d 465, 467 (3d Cir. 1967). Other courts have explained rejection of the rule in even stronger terms, stating that the reasons for it have been "overborne by recognition of possible collusion between settling defendants and plaintiffs and the realization that fundamental fairness demands a sharing by wrongdoers in setting the wrong right." *McLean* v. *Alexander*, 449 F. Supp. 1251, 1266 (D. Del. 1978).

Equally important, courts have recognized that the goal of deterrence will be better achieved by ensuring more comprehensible inclusion of defendants, including intentional tort-feasors. As the Supreme Court said in a recent admiralty case, "[t]he interests of safety dictate that where two parties 'are both in fault, they should bear the damage equally, to make them more careful,' " *Cooper Stevedoring, Supra*, 417 U.S. at 111. A more detailed review follows.

A representative State court reaction to the old English rule is *Goldman* v. *Mitchell-Fletcher Co.*, 392 Pa. 854, 141 At. 231 (1928), where the Pennsylvania court stated that *Merryweather* applied only in cases where the wrongdoers intentionally committed the wrong, knowing it was wrongful.

Federal courts, too, began evolving a more reasonable rule. In *George's Radio, Inc.* v. *Capital Transit Co.*, 126 F. 2d 219 (D.C. Cir. 1942), the court refined the *Merryweather* rule so that it applied in cases where "the parties are not intentional and willful wrongdoers, but are made so by legal inference or intendment." Id. at 223. The court in this case did not feel compelled to follow the controlling State law and allowed for contribution. Another key Federal case allowing contribution is *Gomes* v. *Brodhurst* (a negligence action) cited above.

For other Federal cases, see also *Heizer Corp.* v. *Ross, Fed.* Sec. L. Rep. (CCH). ¶ 96,926 (7th Cir. July 10, 1979) and *Kohr* v. *Allegheny Airlines, Inc.*, 504 F. 2d 400 (7th Cir. 1974).

In *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968), the court held that an antitrust plaintiff was not precluded from recovery by its own participation in the antitrust violation on which it sues, at least where it was not a substantially equal participant in the violation. The court stated that "[w]e have often indicated the inappropriateness of invoking broad common law barriers to relief where a private suit serves important public purposes." 392 U.S. at 138. The court discussed the distinction between a defendant who has exerted more power than another in the conspiracy and concluded that the theory of *in pari delicto* had been in certain cases incorrectly used to bar claims of plaintiffs who were at some degree of fault. As Mr. Justice White stated in concurring opinion:

> When those with market power and leverage persuade, coerce, or influence others to cooperate in an illegal combination to their damage, allowing recovery to the latter is wholly consistent with the purpose of Sec. 4, since it will deter those most likely to be responsible for organizing forbidden schemes. The principles of *Eastman Kodak Co. of N.Y.* v. *Southern Photo Materials Co.*, supra, clearly permit recovery by the less responsible but injured party. 392 U.S. at 145.

The principle of this case, which can be applied generally, is that even if a plaintiff has been a participant in a conspiracy and is found to be partially at fault, that plaintiff is not barred from relief. That is because the public policy interest which is paramount is that of encouraging and maintaining competition.

In *de Haas* v. *Empire Petroleum*, 286 F. Supp. 809 (D. Colo. 1968), *aff'd* in part, *rev'd* in part on other grounds, 453 F. 2d 1223 (10th Cir. 1977), securities case, the court allowed contribution among intentional wrongdoers although the statute did not specifically provide for it. Thereby, the court expressed the opinion that there was a policy that contribution was part of the regulatory framework of the securities laws, whether or not specifically stated in the statute and that contribution should be extended to intentional tort-feasors.

In *Globus, Inc.* v. *Law Research Service, Inc.*, 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd*, 442 F. 2d 1346 (2d Cir.), *cert. denied*, 404 U.S. 941 (1971), another securities case, the court used the *de Haas* case, *supra*, to support the notion that the common law against contribution among joint intentional tort-feasors has changed to allow it, reasoning that to allow an intentionally guilty defendant to escape its fair share of the liability would actually *dilute* the deterrent effect of the laws.

In a third securities case, the court in *Gould* v. *American-Hawaiian Steamship Co.*, 387 F. Supp. 163, 169 (D. Del. 1974) cited *de Haas* and several other cases in support of the proposition that:

> unlike indemnity, contribution would not interfere with the regulatory purpose of § 14 of the 1934 Act. *On the contrary, the availability of contribution would tend to insure that all*

> *individuals jointly liable for a violation of § 14(a) would have some responsibility for damages.* . . . Were contribution not available, those found liable for breach of a statutory obligation might escape liability as effectively as if they were entitled to indemnity. 387 F. Supp. at 163. [Emphasis added.]

(The other cases cited by the court were *Liggett & Myers, Inc.* v. *Bloomfield*, 380 F. Supp. 1044 (S.D.N.Y. 1974); *Herzfeld* v. *Laventhol*, 378 F. Supp. 112, 135 (S.D.N.Y. 1974); *Altman* v. *Liberty Equities Corp.* 54 F.R.D. 620, 625 and *Globus*).

Also in 1974, the court stated in *Alexander Baldwin Inc.* v. *Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 230 (S.D.N.Y.), that:

> *Because of the deterrent policy of the securities laws, even intentional tort-feasors may obtain contribution so that other tort-feasors will not escape liability.* This purpose will be served if defendant tort-feasors are allowed to implead any other tort-feasors involved in the fraud. 385 F. Supp. at 238 [Emphasis added.]

Another case which articulated the policy to allow contribution when the statutory framework is silent is *Odette* v. *Shearson Hammill and Co.*, 394 F. Supp. 946 (S.D.N.Y. 1975). Shearson allegedly sold securities of two shipping companies while in possession of adverse information about them in violation of the securities laws. Shearson sought indemnification under Federal Rule 12(b)(6) from the National Bank of North America. The court denied indemnification but allowed a claim for contribution under Rule 14(a) of the Federal Rules of Civil Procedure, stating:

> Since Shearson may recover contribution for liability under Rule 10b–5, it may also obtain contribution for liabilities under §§ 15(c) and 17(a) which impose similar standards of liability. *A fortiori* it may seek contribution for liability for negligent misconduct under § 12(2). . . . *Id.* at 958.

Relying on *Globus II* (1971), the court stated that the deterrent policy of the securities laws which disallowed indemnification (i.e., shifting of liability), also mandated that tort-feasors other than the underwriter (who was knowledgeable of the wrongdoing) not be allowed to escape from liability for any part of the damages.

When discussing the appropriateness of contribution in the *Muth*[1] case, the court cited *Gould*, *Globus* and *de Hass* in support of the general right of contribution.

In *Doyle* v. *United States*, 441 F. Supp. 701 (D.S.C. 1977), the court discussed contribution under the admiralty laws.

> In admiralty, joint tort-feasors normally have a right of contribution. . . . The State Highway Department and the United States were joint and equal tort-feasors in accordance with the previous apportionment of fault. (Finding of Fact No. 21). The State Highway Department has settled with the plaintiffs, and accordingly, the plaintiffs cannot subject the Highway Department to any further liability.

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[1] *Muth* v. *Dechert, Price & Rhoads*, 70 F.R.D. (E.D. PA. 1970).

> Absent a settlement with one defendant, the liability of tort-feasors is joint and several, and the innocent plaintiff can recover his full damages from either tort-feasor. *Id.* at 710.

In *Doyle*, the court discusses the different formulas which settlement can take, and supports the method of reduction by proportionate fault because it effectuates the goal of assuring that all who are liable must pay and that all culpable parties must face the burden of their wrong actions; this should, therefore, deter them from such actions. No party must pay more than his fair share, and settling parties need pay no more than their settlement sum. Thus, settlements, at least from the defendant's perspective, are not deterred.

Under S. 1468, the plaintiff's propensity to settle should also remain unaffected, since the plaintiff continues to measure the likelihood of recovery and the amount of recovery against the certainty of settlement for a lesser sum. Settlement when contribution is available (under any form of contribution) does not deprive the plaintiff of any more potential recovery than does settlement where no contribution is allowed.

The evolution of the court's reasoning in the securities field is no less applicable to antitrust law. That is, in a regulatory scheme, where one of the goals is to deter destructive or illegal behavior, the best way to do so is to require that all of those responsible for the wrong pay their part of the liability. This ensures that no one gets out of the suit without paying for the wrong committed.

Without contribution, there is an incentive for one guilty party (or one otherwise not willing to litigate) to settle quickly and cheaply, leaving others facing a larger share of the damages. This inequity and impediment to deterrence exists whether the tort is intentional or unintentional, and accordingly, contribution should apply to intentional as well as unintentional torts.

The law has not developed as rapidly in the antitrust field as it has in the other areas, in large part because of the total silence of the antitrust statutes on the matter—a silence this committee has determined to remedy. Aside from two or three recent rulings denying contribution against defendants who have settled (consistently with S. 1468 which would do the same), only three courts appear to have considered and discussed the matter thoroughly. In the most recent and fully reasoned case, the Eighth Circuit held that contribution is available. *Professional Beauty Supply, Inc.* v. *National Beauty Supply Inc.*, 594 F. 2d 1179 (8th Cir. 1979). The court indicated that the deciding factor was "fairness between the parties." 594 F. 2d at 1185. But it stressed the deterrent factor as well, noting that "to deny contribution would be to dilute the deterrent effect of the antitrust laws, since a participant in an antitrust violation could escape all responsibility for its wrongdoing." *Ibid.*

The court reasoned as follows:

> We believe that sound policy reasons dictate such a result [adoption of a rule which would allow contribution from joint tort-feasors in federal antitrust cases] and accordingly hold that under certain circumstances, an antitrust defendant may be entitled to pro rata contribution from other joint tort-feasors. *Ibid.*

The court went on to discuss the holdings of several courts of appeal that there is no right of contribution in Federal antitrust cases and why the rule barring contribution articulated by these cases may be incorrect, concluding that:

> As a minimum *Cooper Stevedoring* and earlier admiralty cases demonstrate that under certain circumstances the Supreme Court is willing to fashion a rule allowing contribution without express direction from Congress. *Id.* at 1183.

To support the contention that a court may fashion a rule of contribution despite statutory silence, the court added:

> We initially note that the antitrust statutes are not purported to be comprehensive and, possibly as a result courts have not been prone to await congressional action to resolve many of the questions left unanswered by these statutes, such as the nature of the cause of action, apportionment of judgments, assignment, survival and limitations. Additionally . . . it is our view that the presence of contribution provisions in the securities laws is some indication that if the question were presented today, Congress would include a right to contribution as part of the antitrust laws. . . . Finally, we find further support for our position from the fact that Federal courts have been willing to formulate rules for contribution in other areas of the law without express congressional direction. *Id.* at 1183–84. [footnote omitted.]

Finally, the court said that adhering to a rule which would have the effect of allowing antitrust violators to escape liability for their wrongdoing undermines the effectiveness of the antitrust laws. *Id.* at 1185–86.

> In sum, we adopt for the Eighth Circuit the rule that contribution may be enforced among joint tort-feasors in an antitrust action. Because of the deterrent policy of the antitrust laws, even intentional tort-feasors may obtain contribution so that other tort-feasors will not escape liability. *Id.* at 1186.

The two most often cited cases denying contribution are not persuasive. *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F. Supp. 1339 (S.D.N.Y. 1969), relied heavily on the general Federal common law rule, and in particular on an early Supreme Court admiralty law decision which retained little validity after the more recent *Cooper Stevedoring* decision, *supra*.

The court in *El Camino Glass* v. *Sunglo Glass Co.*, 1977–1 Trade Cas. ¶ 61, 533 (N.D. Cal. 1976), reviewed the policy reasons advanced for disallowing contribution—complexity, prejudice of plaintiffs' control over their own cases and discouraged settlements (all discussed more fully below)—and concluded that the arguments in favor of permitting contribution are persuasive. . . ." 1977–1 Trade Cas. at 72, 112. Nevertheless, the court felt compelled to deny contribution because of lack of "congressional intent." [2]

The committee has determined that the time has come to supply the appropriate congressional intent (with respect to price-fixing), and to eliminate the confusion that is likely to result from the conflict

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[2] *See also Wilson P. Abraham Constr. Corp.* v. *Texas Industries, Inc.*, No. 78–1788 (5th Cir. Oct. 16, 1979), a decision just rendered denying contribution in a horizontal price fixing case. The court differed with the reasoning of the *Professional Beauty Supply* case, *supra*, noting, however, that "[o]ur decision in this case is certainly subject to reasonable contrary arguments" and that "[t]hose aggrieved by this decision, always have recourse to Congress a forum better suited to evaluation of the competing interests and policies involved."

between the cases just described. In the absence of congressional direction, it would take many years and several trips to the Supreme Court before the decisional law became clear—a view the courts themselves are now expressing. See *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 939 Antitrust and Trade Reg. Rep. (BNA) E–1, E–4 (10th Cir. 1979), discussed more fully below. It is the conviction of the committee that this is too long to wait, and that the injustice of the present situation calls out for the kind of swift and uniform solution which can only be achieved by legislation.

The issue of conflict aside, the question has been raised, why, if Congress did not provide for contribution in 1914 when enacting the Clayton Act, is there need for congressional action now. The Department of Justice, for example, raised this point in questioning the need for this legislation by observing that the issue did not arise before the President's Antitrust Review Commission. It should be pointed out, of course, that the commission completed its work before the issue became focussed nationally in connection with the *Professional Beauty Supply* case before the massive *Corrugated Container* settlements, which were the largest antitrust judgments in history and which are discussed more fully below, and before the most recent *appellate* decisions underscored the need for congressional direction. Relevant here is the fact that the problem of contribution in price-fixing cases is one of relatively recent origin. As the hearing record indicates, the vast class action damage exposure from which the problem results did not surface until the 1970's, after the revision of Rule 23 to permit the modern class action in 1966 and the denial of the pass-on defense in the *Hanover Shoe* [3] case in 1968.

The result, as the record demonstrates, is that the damage sums now being sought—and recovered as settlements—in price-fixing cases are truly staggering. Recent cases have sought damages which literally total in the billions of dollars and which often exceed by many times the net worth of individual defendants. The actual recoveries have also been extremely high. The settlements reached to date in the *Corrugated Container* litigation total nearly $300 million and the case is not yet over. And in the *Plywood* litigation, the three companies that did not settle face over $1.5 billion in potential damages by estimates of plaintiffs' counsel. As will be described more fully below, it is this vast damage exposure that gives rise to the contribution issue. The problem has become especially acute only recently as plaintiffs appear to have recovered more in the last 2 years (nearly $2 billion) than in the previous 50 years. The solution to the problems created by these massive judgments is not, of course, to eliminate the private action, but to see to it that the potential damages are more equally enforced, so that the individual liability, if any, can be more rationally, fairly, and carefully determined.

Critics have questioned whether the legislation should be limited to price-fixing and whether the precise formula set out in S. 1468 will deprive the courts of the flexibility they might need to provide fairness on a case-by-case basis. With respect to the price-fixing limitation, the hearing record and recent case law indicate clearly that price-fixing cases present the most serious problems in need of immediate congressional attention and guidance. On the question of flexibility, the committee determined to provide a certain formula in order to elimi-

[3] *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

nate as much needless complexity and litigation as possible in those cases [price-fixing] where the harm to plaintiffs and benefits to defendants are most easily determined on a mathematical [i.e., sales] basis. Contrary to the separate views, there is no need or sanction for a "relative culpability" inquiry into whether a *price-fixing* conspirator was a "leader" or a "passive participant." *See United States v. Paramount Pictures*, 334 U.S. 131, 161 (1948). The committee has no intention of precluding the courts from developing contribution in non-price-fixing cases where case-by-case judicial flexibility is required and appropriate; and the committee feels that the courts will have ample authority to do so in the same manner as they forged contribution rules in securities cases under those sections of the securities laws where Congress made no specific provision therefor.

2. THE STATE EXPERIENCE

The following 19 States have passed statutes permitting contribution patterned after the Uniform Contribution Among Joint Tortfeasors Act (12 U.L.A. 36) (1979 Supp. 1975 ed.).

State	Statutory citation	Date approved
Rhode Island	R.I. Gen. Laws Sections 10-6-1—10-6-11	1940
Arkansas	Ark. Stat. Ann. Sections 34-1001—10-1009	1941
Hawaii	Haw. Rev. Stat. Sections 663-11—663-17	1941
Maryland	Md. Ann. Code Art. 50, Sections 17-24	1941
South Dakota	S. D. Comp. Laws Ann. Sections 15-8-11—15-8-22	1945
New Mexico	N.M. Stat. Ann. Sections 24-1-11—24-1-18 (replaced by N.M. Stat. Ann. 1978 Sections 41-3-1—41-31-8).	1947
Delaware	Del. Code tit. 10, Sections 6301-6308	1949
Pennsylvania	Penn. Stat. Ann. tit. 12, Sections 2082-2089 (replaced, 1978, and re-enacted in 42 Pa. Con. Stat. Ann. Sections 8321-8327).	1951
Mississippi	Miss. Code Ann. Section 85-5-5	1952
New Jersey	N.J. Stat. Ann. Section 2A:53A:1-2A-53A-5	1952
North Dakota	N.D. Cent. Code Sections 32-38-01—32-38-04	1957
Massachusetts	Mass. Gen. Laws Ann. ch. 231B, Section 1-4	1962
North Carolina	N. C. Gen. Stat. Sections 8-1-18-6	1968
Tennessee	Tenn. Code Ann. Sections 23-3101-23-3106	1968
Alaska	Alaska Stat. Section 09.16.010-09.16.060	1870
Nevada	Nev. Rev. Stat. Section 17.215-17.325	1973
Florida	Fla. Stat. Ann. Section 768.31 (West)	1975
Colorado	C.R.S. 1973, Sections 13-50, 5-101—13-50, 5-106	1977
Wyoming	S. C. Sections 1-1-110—1-1-113	1978

The following 18 States have enacted legislation abandoning the common law rule against contribution among joint tortfeasors.

State	Statutory citation	Date approved
Louisiana	La. Civ. Prac. Ann. Arts. 1111-1116	1954
West Virginia	W. Va. Code Ann. Section 55-7-13	1958
Vermont	Vt. Stat. Ann. tit. 12, Section 1036	1970
New Hampshire	N.H. Rev. State. Ann. Section 507:7B	1971
Kentucky	Ky. Rev. Stat. Section 412-030	1973
Texas	Tex. Civ. Code Ann. art. 2212a, Section 2b	1973
Utah	Utah Code Ann. Section 78-27-39	1973
Wisconsin	Wisc. Stat. Ann. Sections 113.01-113.10	1973
Kansas	Kan. Stat. Ann Section 60-258 (a)	1974
Michigan	Michigan Stat. Ann. Section 600.2925	1974
New York	N.Y. Civ. Prac. Section 1401 (McKinney)	1974
Georgia	Ga. Code Ann. Sections 105-2011—105-2012	1977
Idaho	Idaho Code Section 6-803(1)	1977
Minnesota	Minn. Stat. Ann. Section 604.01	1977
Missouri	Mo. Stat. Ann. Section 537.060	1977
Montana	Mon. Code Ann. 1978 27-1-707	1977
Virginia	Va. Code Section 8-01-34	1977
California	Cal. Civ. Proc. Section 875 (Deering)	1978

The following are States whose statutes are silent on the issue of whether or not contribution applies when the tort is intentional: Rhode Island, Arkansas, Hawaii, Maryland, South Dakota, New Mexico, Delaware, Pennsylvania, Mississippi, Massachusetts, Louisiana, West Virginia, Utah, Wisconsin, Michigan, Idaho and Missouri. New York specifically allows contribution for intentional tort-feasors. It would appear that in the absence of any express proviso barring application in the case of intentional tort-feasors, the statutes do apply to intentional torts.

In England, the common law rule against contribution among joint tort-feasors set out in the *Merryweather* case was abandoned when Parliament passed the Law Reform (Married Women and Tort-feasors) Act 1935 (25 and 26 Geo. 5c 30), which applies to all torts and allows contribution. In addition, an English law which is a counterpart to one of our antitrust laws, the *Restrictive Practice Trade Act*, 1976 c.34, allows a party who is aggrieved by an unregistered restrictive action (agreement in restraint of trade or any other anti-competitive action) to bring an action for violation of the statute. Such a violation is technically a breach of a statutory duty, which in English law would have its own statutory remedy. This statute is a "hybrid" offense which characterizes the breach of the statute as "statutory negligence," creating a tort. And as long as a statute gives a party a civil tort remedy, the 1935 Act applies, and contribution is allowed whether or not the violation is intentional.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
For the Southern District of Texas
Houston Division

In Re Corrugated Container Antitrust Litigation This Document Relates to All Actions Except Civil Actions H-79-87, H-78-2004, H-78-1226, H-78-6718, H-78-1263, H-78-1452, H-78-376, H-78-1815, H-77-2158, H-78-4, H-79-1044, H-79-1086	M.D.L. No. 310

ORDER

Before the court is class plaintiffs' motion for final approval of settlements with twenty-seven defendants[1] in this massive antitrust litigation, in which members of the corrugated industry are alleged to have fixed prices in violation of the Sherman and

1. The settling defendants are: Boise Cascade, Champion International (and Hoerner Waldorf), Chesapeake Corporation of Virginia, Consolidated Packaging Corporation, Container Corporation of America, the Continental Group, Diamond International, Dura Containers, Green Bay Packaging, Inland Container, International Paper, Interstate Container, Longview Fibre Corporation, McMillan Bloedel (including MacMillan Bloedel Containers, McMillan Bloedel Packaging, and MacMillan Bloedel Limited), Menasha Corporation, Olinkraft, Owens-Illinois, St. Joe Paper Company, St. Regis Paper Company, Stone Container Corporation, U. S. Corrugated Fibre Box Company, Union Camp, Weyerhaeuser Company, and Willamette Industries, Western Kraft and Corco, Inc. Non-settling defendants remaining in the class action case are: Alton Box Board Co., Crown-Zellerbach Corp., Fibreboard Corp., The Fibre Box Assn., Georgia-Pacific Corp., Mead Corp., Packaging Corp. of America, Potlatch Corp., Westvaco Corp.; Southwest Forest Industries has reach a settlement agreement which has not yet been submitted to the class.

Clayton Acts. These cases were consolidated in this court for pretrial purposes pursuant to 28 U. S. C. § 1407 in late 1977.

On January 1978 a grand jury sitting in Houston returned indictments against fourteen of the thirty-seven defendants in MDL-310, as well as twenty-six employees of corrugated manufacturers.[2] All but two of the corporations and eight of the individuals indicted entered pleas of nolo contendere and were convicted and sentenced on those pleas. The indictment against one individual was dismissed. The two remaining corporations, Mead and Continental Group, went to trial along with seven individuals; all were acquitted in April 1979.

During the pendency of the government's case, the court first certified a class of direct purchasers in MDL-310 (September, 1978) and then two subclasses; one of container purchasers and one of sheet plants[3] (December, 1978). Discovery was limited during the pendency of the trial of those indicted but was allowed as to grand jury documents and class certification issues.

Two settlements in this case were reached before class certification, with St. Regis and International Paper, on behalf of the whole class, and for a total of $10 million. Nine more were reached, with Union Camp, Boise Cascade, Chesapeake Corporation of Virginia, Diamond International, Longview Fibre, Dura Containers, Champion International (including Hoerner Waldorf), Menasha Corporation, and Willamette, Western Kraft, and Corco, on behalf of the then undivided class, for a total of $68,513,250. These eleven settlements are the "pre-January 5" group which will be referred to throughout this memorandum. Following certification of the sheet plant sub-

2. *U. S.* v. *International Paper, et al,* H-78-11 and *U. S.* v. *Boise Cascade, et al,* H-78-12.

3. A sheet plant is a person, other than a defendant in MDL-310 or their subsidiaries or affiliates, who purchased corrugated sheets, did not itself manufacture corrugated sheets, and did manufacture and sell corrugated containers and/or fillers, pads, and partitions for use in or with corrugated containers. Any class member who is not a sheet plant is in the other subclass.

class, the container purchaser subclass negotiated eleven settlements, with Container Corporation of America, Continental Group, Green Bay Packaging, Inland Container, MacMillan Bloedel (including MacMillan Bloedel Containers, MacMillan Bloedel Packaging Ltd., and MacMillan Bloedel Limited), Olinkraft, Ownes-Illinois, St. Joe Paper Company, Stone Container Corporation, U. S. Corrugated Fibre Box Company, and Weyerhaeuser Company, for a total of $219,530,000. These settlements allocated a possible $14,896,245. to the sheet plant subclass should it desire to participate; it has now applied for an allocation of $11,000,000, which the court has granted. Finally, two "hardship" settlements were negotiated on behalf of the whole class with Consolidated Packaging Corporation and Interstate Container Corporation, for a total of $580,000. With the exception of the last two "hardship" cases, none of the settlements proposed for final approval were negotiated after the beginning of the trial of those indicted. A description of the negotiations has been filed with the court and carefully studied by it.

After the trial of those indicted, notice was mailed to the class, including notice of the proposed settlements. Of the approximately 200,000 members to whom notice was mailed, 210 opted out. Various objections to the settlements were filed, which will be discussed in greater detail below. A pretrial conference was held on December 3 and 4, 1979, to allow a full hearing as to the adequacy and fairness of the settlements. The proponents had filed extensive documentary support and chose not to present further evidence. The objectors were invited to present their arguments and such testimony as they desired; some of them engaged in cross-examination of one of the economic experts whose affidavit had been filed in support of the settlements, and of two attorneys representing sheet plant subclass representatives. This full development of the record has been of great assistance to the court in its determination of the issues presented.

The Proponents' Case

In support of the settlements, proponents have presented the affidavit of an economic expert, Richard C. Hoyt, which indicates that the overcharge by settling defendants to plaintiffs' class was between about two and eight hundred million dollars. This estimate was based on a before-and-after model, using the four years within the statute of limitations as "before" and the years 1977 and 1978, after the grand jury investigation was underway, as "after." The estimate was based on net profits to the settling defendants.

In addition to this economic justification, proponents made the following points in favor of approval: (1) these are partial settlements only, and non-settling defendants remain potentially liable for full damages, less the amount actually paid; (2) the settlements are for a record-making $300 million; (3) they provide for discovery assistance from the settling defendants; (4) they insulate the class from the possibilities of failure of proof at trial, *Illinois Brick* legislation, class decertification, and other potentially harmful events; (5) the settlements are supported by the vast majority of class members and counsel; (6) the settlements (except the "hardship" cases) were negotiated before the acquittals in the trial of those indicted and probably could not be renegotiated at such high figures. Except for Professor Hoyt's conclusions from the economic data, none of the factors favoring approval of the settlements is contested.

The settlement negotiations have been laid before the court in considerable detail and make it clear that they were conducted with authority and at arm's length. The court has previously so found, in preliminarily approving these settlements.[4]

The burden of establishing the fairness, adequacy, and reasonableness is on proponents. *Grunin* v. *International House of Pancakes,* 513 F. 2d 114 (8th Cir.), *cert. denied,* 423 U. S. 864 (1975).

4. Findings of Fact and Conclusions of Law Concerning Proposed Settlement Agreements (May 30, 1979).

The Objections of Class Members

Several objections were filed by class members. Two members of the Plaintiffs' Steering Committee, one of them representing a class representative,[5] object that there was a conflict of interest inherent in negotiating for container purchasers and sheet plants prior to certification of the subclasses and in negotiating for a sum that may be allocated to sheet plants after that certification. This objection was raised and extensively briefed before this court granted preliminary approval to the settlements, and at that time the court specifically found that there was no conflict as to either the pre- or post-January 5 settlements.[6] Messrs. Specks and Sloan, the attorneys raising the objection, requested an opportunity to cross-examine the three experts who prepared proponents' economic documentation and Messrs. Montague, Hayes, and Susman (the former two being attorneys for two of the sheet plant subclass representatives and the latter the chairman of the Plaintiffs' Steering Committee). This opportunity was afforded to them. All these persons were available and willing to testify. Three of them were called; Professor Hoyt and Messrs. Hayes and Montague.

The testimony of Mr. Montague as to the conflict question was as follows: He originally represented three plaintiffs, two of them container purchasers and one a sheet plant which had gone out of business in the early seventies. He did not participate in the settlement negotiations with St. Regis or International Paper, but after class certification and the naming of his sheet plant

5. The class representative client of the other Steering Committee member supports the settlements. Seven other named plaintiffs' attorneys also signed this objection, and it was separately raised by one absent class member.

6. Findings of Fact and Conclusions of Law Concerning Proposed Settlement Agreements, pp. 4-6 (May 30, 1979). The issue was raised at that time by one sheet plant representative, Great Northern Packaging. Great Northern did not file any timely objection to the final approval, but announced at the hearing that it wished to maintain its previous opposition.

client as a class representative[7] he functioned as a member of the plaintiffs' Ad Hoc Settlement Committee and participated actively in or was kept informed by phone of all other pre-January 5 settlements. After the motion of Great Northern Packaging for clarification of the class definition or for creation of a separate sheet plant class, he ceased representation of his container purchaser clients. Atlas and Great Northern were named as representatives of the sheet plant subclass in December, 1978. At the urging of Great Northern's attorney, Mr. Hartunian, he agreed that the sheet plants should not participate in any further settlement negotiations until Mr. Hartunian had had a chance to develop data on any possible differences in damages between sheet plants and container purchasers. He further testified that Mr. Hartunian had not ever developed such data and that his, Mr. Montague's, only study as to possibly different measures of damages for the sheet plants was the evidence presented in the trial of those indicted.

Mr. Hayes testified that he represented Rollins Container in a tag-along action transferred to this court, that his client is a sheet plant and buys about one million dollars' worth of sheets and containers per year. He may have spoken with Messrs. Opperman and Susman (members of Plaintiffs' Steering Committee) before filing his suit and certainly did thereafter. He did not apply for Rollins to become a subclass representative; the court asked whether Rollins would be willing to serve in that capacity and after some doubt Rollins consented. He had not made a study as to a possibly different measure of damages for sheet plants but he had discussed the question with Professor Hoyt and knew the ranges of divisions of sales of sheets and containers for the settling defendants. In his opinion and that of his client, damages were only part of the issue as to the fairness

7. At that time, his sheet plant client Atlas Container was the only named plaintiff sheet plant in MDL-310. Subsequently, a tag-along filed by two sheet plants, Great Northern Packaging and Huron Packaging was transferred to this court by the Panel on Multidistrict Litigation.

of the settlements. In response to a question by the court, he stated that he had always considered injunctive relief very important and had so stated to the court during a pretrial conference.[8]

Professor Hoyt's testimony relative to the conflict question was as follows: The net profit figures of settling defendants were not broken down as to sheets and containers, and he made no attempt to separate them. He did not prepare a separate study as to sheet plant damages.

This question of a possible conflict of interest was raised in connection with the preliminary approval of these settlements, and at that time the court determined that no such conflict existed, for the following reasons: First, no inherent conflict has been shown between sheet plants and container purchasers. The decision to carve out a sheet plant subclass was made out of an abundance of caution, not because an inherent conflict had been demonstrated. There are undeniably some differences between sheet plants and container purchasers: sheet plants compete with the defendants in box sales, may themselves have participated in the alleged price-fixing conspiracy, desire injunctive relief as well as damages, and may have a somewhat different measure of damages.[9] The evidence before the court so far however, would indicate that somewhat different interests and problems may exist for many sub-groups—large purchasers versus small purchasers, pre- versus post-statute of limitations purchasers, West Coast purchasers versus those in other parts of the country, purchasers residing in states whose state laws afford differing measures of relief, purchasers from indicted versus unindicted defendants, and so on. It is not practicable to manage

8. The application of the sheet plant subclass representatives for participation in the post-January 5 settlement funds was made only after a consent decree was negotiated with those settling defendants on behalf of the sheet plant subclass.

9. Whether the measure would be greater or smaller is unclear. Evidence presented in the trial of those indicted could support an argument that sheet plants are entitled to less than other purchasers or even, at the extreme, to no recovery at all.

a case subclassed as to all such internal distinctions, and Rule 23 does not require it.[10] Further, all but the first pre-January 5 settlements were participated in by Mr. Montague, representing a sheet plant and designated class representative. There has been no suggestion that the negotiations were not conducted in good faith and at arm's length. The fact that the court ultimately certified a subclass does not, in and of itself, establish that an inherent conflict ever did exist which would vitiate settlements previously negotiated with full authority and in good faith.

The additional evidence adduced from testimony at the settlement hearing underscores the absence of any conflict. Sheet plants have been represented by a sheet plan at all but the initial stages of the settlement negotiations. Their representation has been enlarged and separated from that of the rest of the class as the development of the litigation has afforded the opportunity and the indications for such additional representation. It is nevertheless clear to the court that, except for the negotiation of injunctive relief, additional representation has not added substantive benefits to the subclass. The objectors point out that damages for sheet plants may be different than those for container purchasers, and that no study has been made to determine whether there is such a difference. Neither the objecting sheet plant representative, nor its experts, nor the other sheet plant representatives made such a study, however. This is not surprising, since the objecting sheet plant's experts agreed with the

10. Even if a potential conflict exists, so long as all class members are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class interests are not antagonistic for representation purposes. Wright & Miller, *Federal Practice and Procedure; Civil* § 1768 and cases cited therein at n. 7 and 8. The practice of negotiating a settlement on behalf of one large class which will later be subclassed for distribution purposes is not uncommon. e.g., *State of West Virginia* v. *Chas. Pfizer & Co.*, 440 F. 2d 1079 (2d Cir.), *cert. denied*, 404 U. S. 871 (1971). Although there have been some assertions that damages are greater than proponents' expert estimates, no one has asserted that more money could have been or could now be obtained from the defendants, or that getting a maximum total fund was not the only motivating factor behind plaintiffs' negotiations on behalf of the entire class.

testimony of proponents' expert that data upon which such a study could be based is unavailable.[11]

The fact is that the funds were acquired pursuant to the entirely common goal of achieving the highest amount possible, and by the time any potential conflict could arise as to division of that fund the sheet plants were separately represented. It is noteworthy that the plan of distribution as to the "hardship" settlements (which no one opposes) is the same as that for the pre-January 5 settlements: sheet plants and container purchasers share on the same basis. Further, the sheet plant allocation from the post-January 5 settlements is based on the fundamental proposition, that all purchasers recover on an equal basis. (The distribution plan is discussed in detail below.)

In sum, as to this alleged conflict, the court can find no sign of prejudice to the sheet plants, or to the rest of the class, either in the negotiations on behalf of the entire class or in the provisions after January 5 for possible allocation to the sheet plant subclass. Nor can it find impropriety or even a superficial appearance of impropriety.

The same objectors also raised questions about several aspects of Mr. Susman's performance of his duties as attorney for a class representative and as chairman of the Plaintiffs' Steering Committee. Mr. Susman filed an affidavit in response which has apparently answered these questions satisfactorily, since objectors did not attempt to controvert the affidavit or even to examine Mr. Susman for further information. The court, too, is satisfied with Mr. Susman's affidavit.

The court is entrusted with a heavy responsibility in a class action and has accordingly explored this issue at greater length than perhaps it deserves. It is a matter frequently of record in this case that an internal struggle within the Plaintiffs' Steering Committee has caused ill will, hard words, dissension and strife.

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11. Report of Drs. John Allen and Roy Gilbert; quantity purchased unknown, p. 2; price index unavailable, p. 4; and affidavit of Dr. Allen.

The attorneys now raising this objection approved the first two settlement agreements. One of them sought certification of the identical large class, with his client (a container purchaser) as class representative. None of the objecting plaintiffs, whose attorneys have been members of Plaintiffs' Steering Committee since its inception, have ever moved this court to provide separate representation for the sheet plants.[12] Inasmuch as internecine conflict among class members may bring to light flaws in the class representation, the court and the class may profit by it; but where in fact the only conflict of interest is a conflict of attorneys' interests, the court also has a duty to ensure that class members do not suffer. To disapprove these settlements on this illusory claim of conflict would work a serious disservice to the class.

Another set of objections and related motions have been filed by certain class members, purportedly on behalf of South Carolina corrugated purchasers, and based upon the requirement of the settlements that a class member release state as well as federal claims. The state antitrust laws of South Carolina, though based on the Sherman and Clayton Acts, provide for a greater measure of damages. Objectors argue from the fact that the state claims were not pleaded and that an action is now pending in state court in South Carolina that this court lacks jurisdiction to approve a final settlement releasing state claims arising out of the alleged conspiracy which is the subject of this suit. The case law is to the contrary. Such releases are reasonable and customary, and without them settlement of large antitrust actions would not be desirable to defendants. *McDonald* v. *Chicago Milwaukee Corp.*, 565 F. 2d 416, 435 (7th Cir. 1977); *Richard's Lumber Supply Co.* v. *U. S. Gypsum Co.*, 545 F. 2d 18, 20-21 (7th Cir 1976), *cert. denied*, 430 U. S. 915 (1977); *Abramson* v. *Pennwood Investment Corp.*, 392 F. 2d 759 (2d

12. The Steering Committee's position on Great Northern's motion to establish a sheet plant subclass was that there was no necessity for it but they did not oppose it. No one at that time dissented from or added to that position.

Cir. 1968). The South Carolina objectors further argue that class notice was defective in that it did not describe the state antitrust laws and did not contain the full text of the settlement agreements. It is clear that this sort of detail is unnecessary and even undesirable in class notice. *Grunin* v. *International House of Pancakes,* 513 F. 2d 114, 122 (8th Cir. 1975); *Gold Strike Stamp Co.* v. *Christensen,* 436 F. 2d 791, 798-99 (10th Cir. 1970). The notice, which included a release, makes plain that state claims will be released by class members. Objectors next request that they be allowed to retain their state claims while remaining in the class as to the federal claims and the settlements. There is no option under Rule 23 to participate in the class and the desirable aspects thereof, such as settlement funds, and opt out as to the undesirable aspects, such as release of claims. *Muldrow* v. *H. K. Porter Co.,* 20 Fed. Rules Serv. 2d 1069 (N. D. Ala. 1975). Of course, anyone who wishes to pursue his claim under state law had the chance to opt out of this class; for those who chose not to do so, the settlements are still fair, reasonable, and adequate. South Carolina case law cited by Judge Chapman in objectors' state case makes it clear that it is very unlikely any court would hold that plaintiffs have a cause of action under the state laws. *Three J Farms, Inc.* v. *Alton Box Board Co.,* 1979-1 Trade Cases ¶ 62,423 at 76,550 (D. S. C. 1978).

A handful of other objections have been raised by these or other class members. The court has given them all careful consideration, although they are not discussed here, and has decided they must be overruled.

The Objections of Defendants

Some of the settling defendants have raised two objections to final approval of their settlements at this time. First, they want to wait until it is absolutely clear that this court's ruling, already affirmed by the Fifth Circuit,[13] that contribution is not available

13. No. 79-2439 (5th Cir., Oct. 30, 1979) (unpublished opinion).

among joint antitrust defendants will not be reversed. Second, they want to wait until it is absolutely clear that the class settlement of all state as well as federal claims will bar any state actions against them. Since the court cannot envision that either unlikely eventuality would entitle settling defendants to rescission or modification of their agreements, these objections are overruled. The settlements were negotiated by very able and experienced lawyers, presumably familiar with the state of the law on contribution and state claims, and it is virtually inconceivable that these two contingencies were not factored in by them.

Non-settling defendants have raised three objections to approval of the settlements. Their standing to object is questionable. *In re Beef Industry Antitrust Litigation* (November 26, 603 F. 2d 1367, 1372-73 (5th Cir. 1979). The court has considered them on the merits, however, for the third time.[14] First, non-settling defendants want the settling defendants' market shares removed from the claims remaining against them. This issue will be ripe for consideration if and when the case is submitted to a jury, and at that time defendants may urge their position. At the moment, this objection to the settlements is untimely. Second, non-settling defendants want class members to be given an opportunity to opt into these settlements but out of the continuing litigation against them. There has been no precedent cited to the court for this novel approach; nor has it been shown that this issue has any bearing on the adequacy, fairness and reasonableness of these settlements. Third, they wish to prohibit plaintiffs from implementing the "most favored nations" clauses of the settlements. As has been repeatedly pointed out in this litigation, the clauses in question are about as toothless as a "most favored nations" clause can be and do not pose any impediment at all to reasonable settlement negotiations with the defendants remaining in the case.

In deciding whether to approve settlements on behalf of a

14. These same objections were raised and overruled in connection with preliminary approval and form of notice.

class, the judge must determine whether they are fair, reasonable, and adequate. The *Manual for Complex Litigation* suggests that the single most important factor to be considered is the strength of the plaintiffs' case in relation to the amount offered in settlement. *Manual* at 56. In this respect, the court must give considerable weight to the fact that the trial of those indicted resulted in acquittal for all defendants, and to the fact that the partial settlements before the court represented a very significant percentage of the total estimated damages to the class.[15] Further factors suggested by the *Manual* are the ability of the defendants to pay (a consideration only applicable to the two "hardship" settlements here); the complexity, length, and expense of further litigation; and the amount of opposition. From the court's extended acquaintance with this litigation, it can say with assurance that continued litigation would be extremely long, complex, and expensive; and that the discovery cooperation clauses will reduce the length and expense to all parties remaining in the case, above and beyond the savings represented by removing the majority of the defendants. As to the settlement opposition, it is noteworthy that far less than one percent of this large class have opted out, and that objections to the settlements were filed by a much smaller number than opted out. The objections have been discussed in detail above and neither by their number nor by their weight do they incline the court to disapprove these settlements. The settlements offer many benefits

15. These calculations use single damages, *City of Detroit* v. *Grinnell Corp.*, 484 F. 2d 448, 458-59 (2d Cir. 1974), and the four year statute of limitations period, In re *Armored Car Antitrust Litigation*, 472 F. Supp. 1357, 1373 (N. D. Ga. 1979); *In Re Anthracite Coal Antitrust Litigation*, 79 F. R. D. 707, 714 (M. D. Pa. 1978). They establish a range of between 170% of actual damages (Professor Hoyt's lowest estimate of damages) to 1.5% (Professor Madansky's estimate of damages, the highest). The court is mindful that a settlement approval hearing is not a trial on the merits, and that the avoidance of necessity for conclusively litigating such questions as the actual damages sustained by the class is one of the main reasons for settlement. *Young* v. *Katz*, 447 F. 2d 431, 433 (5th Cir. 1960). It seems likely that actual damages, if any are found, will be somewhere between these two extremes.

to the class. They provide a very substantial recovery without giving up any claimed damages that may ultimately be proved. They provide for valuable discovery assistance, and they ensure against the many uncertainties of continuing litigation. They were negotiated before the evidence was presented and the defendants acquitted in the trial of those indicted; it would be a long, hard and expensive task to achieve equal concessions should the court disapprove these settlements and send the parties back to their negotiations. The law favors settlements, and certainly it should favor these.

The Plan of Distribution

The Plaintiffs' Amended Plan of Allocation and Distribution provides that all claimants share in the pre-January 5 and "hardship" settlements on the following basis: all allowed claims will be totalled and the sum divided into the total fund (after deduction of fees and costs), and the quotient will be multiplied by each claimant's total allowed claim to determine his recovery. As to the post-January 5 settlements, the same procedure would be used except that container purchaser subclass members would claim against the total fund less $11,000,000, and sheet plant subclass members would claim only against the $11,000,000. Allowed claims would be for purchases over the entire eighteen-year period covered by the complaint. There were three objections to this plan. Schlitz and A & P objected only that they had not understood it, and after it had been elucidated they withdrew their objection. One class member objected that the claims period should be for less than eighteen years. To shorten the period would prejudice claimants who purchased for the full period, and a pilot study conducted by Arthur Andersen & Co. indicates that the savings in auditing would not be great enough to justify such a limitation. Finally, a sheet plant claimant objects that it must claim only against the $11,00,000 for the post-January 5 settlements although it purchased both sheets and containers. Sheet plants will recover on all purchases, not only

sheet purchases; and the size of the fund has been decided based on the estimated relation between sheet plant purchases and other class member purchases. Of course, any class member's ultimate dollar recovery will depend on how many other claims are filed against the relevant fund, and this cannot be assessed accurately in advance. The distribution plan appears to be fair and has the support of almost all potential claimants.

Therefore, having reviewed the evidence and arguments presented in support of and opposing the final approval of the settlements in these cases, including briefs, affidavits, economic studies and the testimony of class plaintiffs' economic witness and certain counsel, this court hereby FINDS and ORDERS as follows:

1. Each and every objection to the settlement agreements is overruled. The motions of certain South Carolina class members are denied for the reasons set forth herein.

2. The settlements, which require dismissals with prejudice of state and federal claims as set forth in paragraph 3 below, are fair, reasonable and adequate and therefore finally approved.

3. There being no just reason for delay in entering final judgments, such final judgments are hereby entered pursuant to Rule 54(b), Federal Rules of Civil Procedure, dismissing with prejudice all claims of the Container Purchaser Subclass against Boise Cascade, Champion International (and Hoerner Waldorf), Chesapeake Corporation of Virginia, Consolidated Packaging Corporation, Container Corporation of America, the Continental Group, Diamond International, Dura Containers, Green Bay Packaging, Inland Container, International Paper, Interstate Container, Longview Fibre Corporation, MacMillan Bloedel (including MacMillan Bloedel Containers, MacMillan Bloedel Packaging, and MacMillan Bloedel Limited), Menasha Corporation, Olinkraft, Owens-Illinois, St. Joe Paper Company, St. Regis Paper Company, Stone

Container Corporation, U. S. Corrugated Fibre Box Company, Union Camp, Weyerhaeuser Company, and Willamette Industries, Western Kraft and Corco, Inc.; and all claims of the Sheet Plant Subclass against Boise Cascade Corporation, The Chesapeake Corporation of Virginia, Consolidated Packaging Corporation, Diamond International Corporation, Dura Containers, Inc., Hoerner Waldorf Corporation and Champion International Corporation, International Paper Company, Interstate Container Corporation, Longview Fibre Company, Menasha Corporation, St. Regis Paper Company and Union Camp Corporation, arising under the antitrust laws of the United States or of any state or other jurisdiction, or any similar statutory or common law, which have been, might have been, are now or could be asserted in these actions in connection with corrugated containers and corrugated sheets or which relate to or arise out of the alleged unlawful conspiracy to fix, raise, maintain or stabilize the prices of corrugated containers or corrugated sheets as alleged in the Unified and Consolidated Complaint on file herein, provided that the court shall retain jurisdiction over discovery disputes between the settlement class and settling defendants as provided by the settlement agreements.

DONE this 21st day of December, 1979, in Houston, Texas.

/s/ John V. Singleton
United States District Judge

APPENDIX C.

Excerpt from Appendix "A" to the Letter from J. Albert Kroemer, United States Department of Justice, Antitrust Division, Dallas office, dated July 21, 1978, to All Attorneys in Charge, and filed as a voluntary bill of particulars, listing those individuals whom the United States believes to be co-conspirators in the combination and conspiracy alleged in the indictment:

Green Bay Packaging, Inc.

Ballard, George, Chicago, IL
Briggs, Robert M., Green Bay, WI
Collins, James, Green Bay, WI
Cott, Walter G., Green Bay, WI
Leaman, Don, Ft. Worth, TX
Madson, Mayne M., Chicago, IL
Morgan, William, Ft. Worth, TX
Rollin, James, Ft. Worth, TX
Schwyn, Robert, Kalamazoo, MI
Tiller, Charles, Kalamazoo, MI
Will, Gona R., Kalamazoo, MI